In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1480

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

ARGUMENT

QUESTION I

WHETHER A DEFENDANT'S POST-MIRANDA WARNING BEHAVIOR, INCLUDING SILENCE, MAY BE USED AS SUBSTANTIVE EVIDENCE OF HIS SANITY AT OR NEAR THE TIME OF THE OFFENSE WHEN THAT DEFENDANT ELECTS TO PRESENT AN INSANITY DEFENSE, OR WHETHER SUCH USE OF POST-MIRANDA[1] SILENCE IS VIOLATIVE OF DOYLE V. OHIO, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)?

Despite the simple fact that no contemporaneous objection was made at trial to the testimony of Officers Pilifant and Jolley and that the only objection registered was to the prosecutor's allegedly improper comment on the defendant's exercise of his right to remain silent (JA 97 - 98), respondent now argues that the officers' testimony and the comments thereon were irrelevant to the sanity

---

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

issue.[2] (Respondent's brief at pp. 11 - 20) Had such an objection been made at trial,[3] the relevancy of this testimony could have been thoroughly explored. Expert witnesses could have, for example, been asked their opinions on the relationship between respondent's behavior at the time of his arrest, just two hours after the offense, and his sanity or lack

---

[2] In fact, the relevance of the challenged testimony was never seriously challenged until the Eleventh Circuit's declaration in the case at bar that the evidence was not probative of sanity. Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) at 333, 334. The Second District Court of Appeal, in addressing in the alternative the merits of this issue on direct appeal found the testimony to be "certainly . . . relevant." Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) at 1023.

[3] It is a well settled principle of Florida law that a defendant cannot on appeal of an issue rely on grounds different than those presented by objection in the trial court. See e.g., Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

thereof at the time of the offense. As it is, we are left with respondent's contention, supported with citations to psychiatric authorities that silence may not always be indicative of sanity.

We are also left with the state trial record in this cause which contains the testimony of defense psychiatrist George Lose that he examined respondent approximately two months after the offense and opined that respondent did not know right from wrong at the time the offense was committed. (SR 117, 126) Dr. Lose explained the basis for his opinion in some detail, noting the types of answers given by respondent to Dr. Lose's questions, and why these responses, given two months after the offense tended to establish respondent's legal insanity at the time of the offense. See e.g., SR 128, 129, 133.

Surely the trial jury, which bore the ultimate responsibility to determine sanity, could properly consider respondent's comments and responses to Officers Pilifant and Jolley in light of Dr. Lose's testimony in order to draw its own conclusion.

In his brief, respondent criticizes petitioner for characterizing the officers' testimony as demeanor evidence. (Respondent's brief at 14). Respondent misses the point that the officers' statements concerning respondent's affirmative invocation of his rights are an integral part of that testimony pertaining to respondent's behavior at the time of arrest, (JA 71 - 81), all of which bore on respondent's understanding and awareness of what was going on around him at a point in time close to the offense. Cf. United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99

S.Ct. 175, 58 L.Ed.2d 166 (1978).

Respondent argues that no distinctions can be drawn between use of post-arrest silence to establish guilt of the substantive offense charged and use of silence as evidence tending to show sanity; and that silence cannot be used to rebut an insanity defense any more than it could be used to rebut any other affirmative defense. Yet, the insanity defense has frequently been treated differently than other defenses with certain burdens being imposed on individuals who seek to rely on the defense. In both federal and Florida courts the defense must be raised by pretrial notice. Rule 12.2(a), Federal Rules of Criminal Procedure; Rule 3.216 (b), Florida Rules of Criminal Procedure. A defendant raising an insanity defense may be compelled to submit to a court ordered psychiatric examination and

statements made by the defendant during the course of the examination may be admitted into evidence on the issue of sanity. Cf. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); United States v. Halbert, 712 F.2d 388 (9th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984).

Neither the Fifth Amendment, nor this Court's holdings in Doyle, supra, and United States v. Hale, 422 U.S. 71, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) are compromised by the admission of respondent's post-Miranda warning behavior including silence on the nebulous issue of sanity. The judgment of the Eleventh Circuit should be reversed.

QUESTION II

WHETHER THE COURT OF APPEALS DECISION IN THE INSTANT CASE WHICH REACHED THIS CAUSE ON THE MERITS IS IN CONFLICT WITH THIS COURT'S DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.CT. 2497, 53 L.ED.2d 594 (1977), WHERE RESPONDENT'S CLAIM WAS BARRED BY HIS FAILURE TO COMPLY WITH FLORIDA'S CONTEMPORANEOUS OBJECTION RULE?

The Court of Appeals below elected to address the merits of Wainwright's procedural default claim notwithstanding the fact that it had not been briefed in that Court.[4] Petitioner argued the errors in the resolution of the Sykes claim on rehearing. (JA 38 - 45) Thus, this is not an instance in which the lower court had no opportunity to consider the claim, and

---

[4] The procedural default claim was vigorously pursued in the district court. (R 162 - 171, 17 - 26).

it is therefore properly before this Court.[5] Cf. Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855, n. 7 (1974); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973).

Respondent's allegation that the objection to the prosecutor's comment was sufficient to preserve the issue for appeal lacks adequate support in Florida case law. Where no objection is made to testimony, it will be regarded as having been received by consent and its admissibility will not be considered on appeal, McCullers v. State, 143 So.2d 909 (Fla. 1 DCA 1962). Reversible error cannot be

---

[5]By analogy it would seem that if a federal court can consider the merits of a claim when the state court ignores a procedral default, this Court also must have the power to address the merits of an issue reached by a Court of Appeals. Cf. County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

predicated upon the admission of evidence to which no objection was made at trial. Albano v. State, 89 So.2d 342 (Fla. 1956). It is proper for the prosecutor to comment on properly admitted evidence in his closing argument. Cf. Blair v. State, 406 So.2d 103, 1106 (Fla. 1981); Wilson v. State, 305 So.2d 50, 52 (Fla. 3 DCA 1974); 55 Fla. Jur. 2d, Trial §107 pp. 511 - 512 (1984).

In both Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1978) and Collins v. Auger, 577 F.2d 1107 (8th Cir. 1978) relied on by respondent for the proposition that the objection at bar was adequate, the defendants made timely, if inartful, objections to the tesitmony they took exception with. Neither was a situation in which testimony was allowed to come in without objection until the prosecutor attempted to argue facts in evidence to the jury. For this

reason, both Thomas and Collins are inapposite here.

The United States magistrate did not address respondent's claim that cause and prejudice existed for the failure to object to the testimony of Officers Pilifant and Jolley. (JA - 53) Respondent has never raised an ineffective assistance of counsel claim.

At the time of trial, petitioner's counsel had to be aware that the testimony in question might be objectionable. See Bennett v. State, 316 So.2d 41 (Fla. 1975); Jones v. State, 200 So.2d 574 (Fla. 3 DCA 1967). Thus the issue was not one which had no reasonable basis in existing law so as to provide "cause" for the failure to object. Cf. Reed v. Ross, 468 U.S. __, 104 S.Ct. ___, 82 L.Ed.2d 1 (1984). Respondent has not shown cause for his

failure to object. Cf. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). reh. den. 73 L.Ed.2d 1296 (1982).

This court should reaffirm the continuing validity of Wainwright v. Sykes, supra and Engle v. Isaac, supra and reverse the Eleventh Circuit's holding that an untimely objection or objections may substitute for a proper contemporaneous objection.

CONCLUSION

Based on the arguments contained herein and the petitioner's opening brief on the merits, petitioner asks this Court to hold that a defendant's post-Miranda conduct, including silence, may be admitted at trial when sanity is the principal issue and when the behavior is sufficiently contemporaneous in time to the offense charged as to be relevant evidence of the defendant's mental state at the time of the offense.

Petitioner also asks this Court to hold that since the Florida Courts enforced Florida's contemporaneous objection rule in this case, respondent's petition for habeas corpus was subject to dismissal under Wainwright v. Sykes, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ann Garrison Paschall
ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 28th day of October, 1985, I served three copies of the Petitioner's Reply Brief on the Merits on James D. Whittemore, Esq., Counsel for Respondent, One Tampa City Center, Suite 2470, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid. All parties required to be served have been served.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER